BRIEF IN SUPPORT OF PETITION.

Questions Presented, Statement of Case, Statutes Involved.

The statement of questions presented, the statement of the case, and the statutes involved will be found in petition.

Specification of Errors and Summary of Argument.

1. The Circuit Court of Appeals erred in reversing the decision of the District Court that petitioner was actively engaged in business; that the transaction in question was a normal business transaction and that the payment was an ordinary and necessary business expense of his business under section 23(a) and a loss incurred in his trades or businesses under section 23(e). Such questions were questions of fact or at most mixed questions of fact and law. The Circuit Court of Appeals was without authority to reverse the District Court on these questions, without ascertaining whether or not the evidence supported the findings made by the District Court. This the Circuit Court could not and did not do.

2. The Circuit Court of Appeals erred in disregarding the law established on the questions involved by the uniform decisions of the United States Board of Tax Appeals as well as the decision on the identical question under a like statute by the Appellate Division of the Supreme Court of the State of New York.

ARGUMENT.

I.

The Circuit Court erred in reversing the District Court on the fact questions involved, without reviewing the evidence.

The record before the Circuit Court in this case was the Findings of Fact and Conclusions of Law made by the District Judge after consideration of all of the evidence presented at the trial, which was considerable. Without as much as the availability of such evidence for review, the Circuit Court reversed by stating that the District Court was not justified in making the findings that it did. Such procedure, it is submitted, is erroneous and without legal authority.

In cases originating in The Tax Court of the United States, the rule as established in *Commissioner* v. *Heininger*, 320 U. S. 476, *Dobson* v. *Commissioner*, 320 U. S. 480 and as expressed in *Commissioner* v. *Scottish American Co.*, 323 U. S. 119, 123-124 is:

> "The Tax Court has the primary function of finding the facts in tax disputes, weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which it considers most reasonable. The Circuit Courts of Appeal have no power to change or add to those findings of fact or to reweigh the evidence * * *. If a substantial basis is lacking the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings. But if such basis is present the process of judicial review is at an end."

In the case at bar there was nothing before the Circuit Court from which it could have drawn inferences of fact,

nor could it say, on the record that was before it, that the case should have been remanded for lack of substantial evidence to sustain the findings, inferences and conclusions of the District Court.

The reasoning of the *Heininger* and the *Dobson* cases is not based so much upon the particular skill and specialized experience of the judges sitting in the Tax Courts, as it is based upon the policy against cluttering the appellate courts with what are essentially questions of fact. We respectfully submit that the determination of a Federal District Judge after a full trial before him, is entitled to the same presumptions of regularity and conclusiveness as those of a Judge of the Tax Court.

We should be the last to suggest that the judgment of a United States District Judge on the facts in a tax case is necessarily inferior to that of a Judge sitting in the Tax Court. If such should turn out to be the law, we venture to suggest that a proper caution would lead taxpayers to seek always the traditional jurisdiction of the District Courts, where either party might, under the law as understood before the decisions of the *Heininger* and *Dobson* cases, have possibly two and even three bites at the cherry, when the facts were in dispute before the District Court and brought under review in the Circuit Court of Appeals and finally to this Court.

The rule is no different where the question is a mixed question of fact and law. The test still remains, "is the decision of the lower court supported by the evidence". *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 871. This can be determined only from an examination of the evidence. The Circuit Court was in no position to do this in the instant case.

II.

The decision of the Circuit Court is in conflict with established line of decisions.

The question before the District Court had been decided by the Board of Tax Appeals in three cases, *Bank of Skowhegan*, 35 B. T. A. 876; *Robert Gaylord, Inc.*, 41 B. T. A. 1119, and *Maloney Electric Company*, 42 B. T. A. 78. The petitioner successfully litigated the question in the New York Courts in *People ex rel. I. Hasbrouck Chahoon* v. *Mealey et al. constituting the State Tax Commission*, 268 App. Div. 49. The decision of the Circuit Court in the case at bar is in conflict with all of these decisions.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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